IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 41

A. I. MECHLING BARGE LINES INC., ET AL.,
Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.
Appellees.

REPLY BRIEF FOR APPELLANTS.

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The Scheffer Press, Inc.—ANdover 3-6850

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REPLY BRIEF FOR APPELLANTS.

In their respective briefs on the merits before this Court the Commission and the railroads have taken positions that are no longer identical.

Both maintain here their contention in the court below that this case is moot and that therefore neither injunctive nor declaratory relief may be granted. The railroads continue to ignore the nature of appellants' complaint of the *recurring* injury done them by the *continuing* practice of the Commission of which F.S.O. 19059 is a particular instance. That is to ignore the case presented. In consequence they misdirect their comment and citation.

The government's attitude appears to recognize (Part I, 2, of its Argument, pp. 22-27) that recurring injury from a continuing practice can preserve the Court's jurisdiction over a suit in which such injury is alleged, even when the particular instance of the practice is discontinued under pressure of the litigation.

In view of that, it is difficult to see how the government can join the railroads in the position that this case is moot; especially when the practice of entering such orders over the protests of proper parties without hearing (contemporaneously ordering investigation by hearing) is a practice that admittedly continues, and is admittedly challenged.

The government's argument is that there can be no such recurring injury unless *exactly* the same order can be repeated (Br. 24), thereby proposing a limitation on the doctrine of retained jurisdiction which is not found in the authorities and is contrary to their doctrine. The doctrine of the authorities is that parties cannot be left remediless against like recurring injury by repetition of exactly the same inveterate, illegal practice, just because defendants are able to terminate the effectiveness of any particular instance of the injurious and illegal practice complained of before the prescribed process of judicial review can be completed. Particularly, this is applicable when continuing practices of administrative agencies are challenged as unlawful, since by the termination of any instance of the challenged practice before judicial review is completed such agencies would otherwise be able to create for themselves a no-man's land for unlawful and injurious administrative action by repeated short-term orders, unrestrained by the ultimate judicial control of this Court that Congress provided. The Commission's contention that

it is free to avoid, in this way, final condemnation by this Court of any recurrent, short-term illegality that it does not itself choose to correct unless *exactly* the same order can be repeated "except for the dates" (Br. 24) would recast the plain doctrine of the authorities in terms of triviality to which that doctrine is not addressed.

It is, therefore, incidental and not essential to the application of the doctrine that in fact (contrary to the Commission's frivolous premise) *exactly* the same order *can* be repeated. The next general rail-rate increase can put the intermediate short-haul rates up to *exactly* the same point from which the railroads reduced them to avoid this judicial review, the water-competitive long-haul rates can be left *exactly* where they were, and the Commission can then enter *exactly* the same Fourth Section order—"except for the dates" and the file-number. It is not that, however, but the considerations enumerated at pages 20-22 of our brief, on which the authorities place the doctrine of retained jurisdiction.

The Commission also suggests that if plaintiffs could recover the damages they have suffered in any event (which it continues to doubt) they can do so *without* setting aside, on this direct review, its orders that unlawfully gave the railroads authority to inflict those damages (Br. 12). It makes no reply, however, to the decisions of this Court that forbid collateral attack on Commission orders. (Our Brief, 24)

The railroads are the parties against whom the suit would be brought in which, the Commission suggests, the effect of its orders could be determined collaterally, without setting them aside here. The railroads do not concede (and predictably would not concede) that these orders

could be collaterally attacked, in view of this Court's decisions that no collateral attack will be allowed.

Moreover, this is interestingly different from the Commission's position before this Court on motion to affirm which, in this respect, was only that because plaintiffs are not shippers they could never recover their damages. (Motion 4-5)

The Commission does not dwell on its suggestion that a court would entertain such collateral attack, apparently for the further and more basic reason that it has now been made apparent that to remit the water carriers to successive proceedings (of any sort, or before any tribunal) for the damages inflicted by unlawfully authorized rates, is not to give water carriers the protection against destructive rail-rate competition (by lower rates for longer water-competitive hauls) that Congress provided by the Transportation Act of 1940, with its injunction to preserve the inherent advantages of the various forms of transportation, prevent destructive competition and construe *all* sections of the Act (including Section 4) so as to effectuate this purpose.

The Commission now concedes, as the railroads, however, do not, that its order was unlawful and that its practice has, of late years, been unlawful in that its orders contained no findings, and that the water carriers thus have not been accorded (in that single respect, it says) the protection that Congress intended by the 1910 amendment of Section 4 against this form of destructive competition. That concession, however, is *not* made by annulling the unlawful orders here directly attacked. And even that limited concession does *not* bind the Commission, whose practice, it says, has *fluctuated over the years* (as the decision of this Court *would* bind it) to observe

a procedure that it admits—for the purposes of this case—to be a required procedure which it has disregarded. If this limited concession were put forward in aid of any contention of mootness, its effect, if it were to succeed in that, whatever its purpose, would be to escape, yet again, a binding determination of the unlawfulness (even in that respect) of the practices the Commission admits by answer that it still followed when *this* action was commenced. (R. 4, 31, 39, Fed. R.C.P. 8 (d).) Such changes, made only under the pressure of the immediate litigation, that do not result in binding determinations, leave the defendants with a burden of proof that "it will never happen again" that no administrative agency can meet, for its personnel at any time can never bind their successors on important questions of their public duty. And the single change that is announced in an appellate brief to have been made pending this litigation does not extend to the whole of the admitted subject-matter of the controversy, which goes to the practice of entering orders authorizing such rail competition to be commenced, in disregard of the long-haul-short-haul prohibition enacted by Section 4 for the protection of water carriers, without completing the investigation that the Commission orders, *viz.*, it goes to the practice of entering such orders *in protested adversary cases* before the hearing.

The railroads present for the first time contentions, in which the government does not join, that appellants have no justiciable interest in the intermediate or short-haul rate (ignoring that Section 4 was enacted for the protection of the competing water carrier against destructive competition by the long-haul rate) and have not exhausted their administrative remedies. Both these contentions are based on a misconstruction of one sentence in Justice Brandeis' opinion in *United States* v. *Merchants and*

Manufacturers Traffic Association (also known as the *Sacramento Case*) 242 U. S. 178 (1916). As noted above, the railroads refuse to recognize that the appellants here complain of the injury done them by the Commission's continuing practices, a method of entering F.S.O. 19059 and like orders in violation of *Section 4* of the Interstate Commerce Act as amended in 1910 (and in violation of constitutional limitations). They refuse, that is to say, to face the fact that there is no lawful substitute for the protection of the procedures that the law requires.

Fourth Section orders conclude nothing as to the compliance with the standards of Sections 1, 2, or 3 of the Interstate Commerce Act,[1] at least as to parties who have not participated in the Fourth Section proceedings, and thus those different issues are open and must first be presented to the Commission in proceedings under Sections 13 or 15.[2] Those were the issues left open by this Court in the *Sacramento Case, supra.* But the Commission's order *does* authorize the rate under Section 4. The issue we raise is that it has not lawfully authorized the rate. On that issue the order silences us everywhere until it is set aside in the only proceeding—this proceeding—in which Congress has allowed it to be reviewed.

The government and the railroads further diverge in their position when the government acknowledges the necessity for findings in the order (and, in that respect only, confesses its invalidity without, however, voiding it so as to remove it as a bar). The railroads, on the other hand, insert a half-hearted passage stating that any contention that findings are ever necessary in Fourth Section proceedings is negated by the Administrative Pro-

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[1] 49 U.S.C. §§ 1, 2, 3.

[2] 49 U.S.C. §§ 13, 15.

cedure Act. In this, the railroads find themselves in disagreement with the position the Commission takes just now. More important, they ignore altogether such cases as *Panama Refining Company* v. *Ryan*, 293 U. S. 388 (1935) and *Alabama Great Southern Ry.* v. *United States*, 340 U. S. 388 (1950) which hold that such findings are necessary on grounds that have nothing to do with the Administrative Procedure Act.

Both the government and the railroads insist that a hearing is not necessary. Here again their positions are no longer identical. They are alike, however, in the respect that their statements of questions presented both treat this case as involving all kinds of Fourth Section proceedings (Govt. Br. p. 2 and Rr. Br. p. 2) rather than the limited group of protested Fourth Section applications, described in the complaint of these regulated water carriers, as to whom Congress gave the Commission "not only the power, but the duty, to protect and foster"[3] by the Transportation Act of 1940. Thereby appellees attempt to push forward very broad questions that are not here for decision, and which obscure the narrower issues that arise on this complaint. Apparently this is done in order to make selective references to a Congressional history which, if apposite at all, is so only when its more complete statement discloses that during the half century since Congress used the word "investigation" in Section 4 the Commission has given Congress to understand that it applied "*investigation*" to mean that whenever a proper party protested or asked for a hearing, he got one.[4] If Congressional history is ever apposite to constitutional questions of due process that are raised here (R. 63) which the government does not face, it must be to show

[3] 86 Cong. Rec. 10172.

[4] 65 Cong. Rec. 8880, 8881.

that Congress intended its language to be understood in a sense that has constiutional validity.[5] *In particular, there has been no statement to Congress that when proper parties appeared and took issue on the facts alleged in a railroad application for an order to depart from the Fourth Section, the Commission followed the Alice-in-Wonderland practice of making its findings on the decisive, contested facts of that pending adversary proceeding first, and holding the hearing afterward.*

The railroads similarly make no attempt to distinguish these areas of Fourth Section activity, and treat the question of the lawfulness of these procedures when no one objects to the application, as being the same as the question of the lawfulness of the same procedures when protests are filed by proper parties and there is a pending, adversary proceeding on the decisive, contested issues of fact.

In the end, unlike the railroads, the government does not consistently ignore the more limited problem presented by this case of how properly and lawfully to deal with requests for hearings, on protests filed against Fourth Section applications by those competing regulated water carriers, the diversion of whose traffic to the rail-

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[5] Since the Transportation Act of 1940 the Commission does not consider that exempt water carriers or private water carriers have any rights under any section of the Interstate Commerce Act. Cf. James-McWilliams Blue Line v. U.S., 100 F. Supp. 66 (S.D. N.Y.); aff'd 342 U.S. 951. The question does not arise here. These appellants are regulated common carriers by water, certificated under the Transportation Act of 1940. (R. 2-3)

Some ninety per centum of Fourth Section proceedings are uncontested by anyone. See for example, 65 Cong. Rec. 8881; Hearings on S. 2327, before the Senate Interstate Commerce Committee, 68th Cong., 1st Sess., 464.

roads the applications are avowedly designed to accomplish. It does not, however, consider (1) the inequality of opportunity for the water-carriers to prepare protests (15 days) compared to the unlimited time available to the railroad applicants to prepare and amass selective, tendentious or disputed data in their applications; or (2) the disturbance of the status quo wrought by orders granted before hearing and in spite of protests; or (3) the irreversible injury to these appellant water carriers of the Commission's orders, entered without hearing, during the years that they customarily continue in force; or (4) that when contested issues of fact are presented to a federal tribunal on which it must make and state findings of fact that will be decisive of its direct determination of, and action on, the legal rights of the contending parties before it (to the immediate, continuing and irreversible, loss of one or the other of them) due process imperatively requires observance of the procedures that judicial experience has traditionally established as essential to a fair opportunity to be heard. Yet the government rests its support of orders based on incomplete investigation by the Commission on a citation of the language of Mr. Justice Brandeis in the *New England Divisions* case,[6] in which this Court reviewed an order which was entered only after extensive formal hearings and *which specifically provided a means of complete escape* from *any* injurious application in any individual instance.

The last point receives the most attention in what follows, because of its importance to these appellants (and, indeed, to the transportation industry).

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[6] 261 U.S. 184, 200 (1923).

We readily agree with the government that this Court has jurisdiction to review the lower court's determination. (Br. 17) We note that the government agrees with us that the issues, if not found to be moot, are of public importance warranting decision by this Court in this proceeding (Br. 16).

I. THIS CONTROVERSY IS JUSTICIABLE.

In the first section of their respective briefs both the government and the railroads have continued their insistence that F.S.O. 19059 no longer has any effect and that therefore no controversy exists between the parties as to which either injunctive or declaratory relief can be given. The case presented here is one of recurring injury to appellants from the Commission's continuing practice, of which the orders here under attack are an instance. Appellees still rely, as they did in their Motion to Affirm, upon cases in which no such continuing practice or recurring injury was alleged. In most of these cases the parties had by mutual agreement settled their dispute or a change in circumstances beyond their control had removed the area of dispute. None of appellees' citations presents the different situation described in the complaint; or the situation in which the defendants alone have attempted under the pressure of the litgation to remove the immediate area of dispute—as they had done before in other like situations when the legality of their practices was brought under legal attack, only to continue the challenged practices after the court's hand was no longer on their shoulder.

The lower court held that federal judicial power to give relief did not exist (R. 64). The Commission asks for outright affirmance (Br. 18).

Judicial power extends to cases and controversies (Const. Art. III). The railroads ignore the averments of

recurrent injury from continuing unlawful practice of which these orders, whose review we seek, are instances.

The Commission argues that federal judicial power lapses unless *exactly* the same unlawful act can be repeated, and that in this context this means entering exactly the same unlawful order "except for the expiration dates". If that were the landmark of judicial power, exactly the same unlawful order can be entered again here, "except for the dates" (*Vide supra* p. 3). The considerations that are regarded in applying the doctrine of retained jurisdiction, however, are enumerated in our brief at pages 20-22. The appellees ignore them.

Certainly it could not be said (for example) that the Secretary of Agriculture's annual orders fixing sugar quotas would be exactly the same each year. It was enough in *Gay Union Corporation* v. *Wallace,* 112 F.2d 192 (D.C. Cir., 1940), *cert. den.,* 310 U.S. 647, that the *practice* of the Secretary in fixing the quotas might be repeated from year to year in the absence of effective court review. Unless effective judicial review is obtained, the Commission will continue its practice of entering temporary fourth section orders without giving any hearing to regulated water carriers in a competing mode of transportation, to whose injury the railroads' fourth section applications are avowedly directed.

Before the lower court, the government and the railroads insisted in their respective answers upon the entire lawfulness, in every respect, of the practice employed in entering these orders. That included both the practice of entering such orders without findings, and the admittedly continuing practice of entering such orders allowing such injury to be

immediately inflicted without hearing—the hearing that the Commission contemporaneously ordered of the very issues upon which the order, already made, entirely depended. The holding below was that federal judicial power did not extend to the case in *that attitude* (R. 64-65). Yet clearly the controversy between the parties as to the propriety both of the Commission's continuing practice and of this particular order, continues. Such a controversy lies within the power of the judiciary. *Public Utilities Commission of California*, 355 U. S. 534 (1958), *reh. den.*, 356 U. S. 925; *Carpenters' Union* v. *National Labor Relations Board*, 341 U. S. 707 (1951).

The Commission argues (Br. 34) that because it admits here the invalidity of this order for one reason, it is "unnecessary for the court to consider the other two grounds on which appellants attack it"—*viz.*, attack the order.

> "The *questions* involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission *without a chance of redress.*" (Our emphasis.)[1]

The government makes its above suggestion (that it is "unnecessary for the court to consider" two of the grounds upon which the Commission's practice in entering this order and other like orders is challenged) in support of its argument that the Commission can enter such order *without hearings* (Br. 34). This seems inconsistent with

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[1] **Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 515 (1911).**

the government's statement that: "In this case, however, the substantive questions * * * are of general importance and warrant decision by this court." (Br. 16). It is apparent that with respect to the illegality of its admitted practice in entering these orders without hearings the controversy continues.

The Commission (not the railroads) admit only in an appellate brief the illegality of the entering of these orders without findings. Where illegal acts of private individuals are legally challenged and they are discontinued pending litigation with promise of reform, the question of the likelihood of recurrence, in the absence of some binding determination, receives attention. Private individuals can speak for themselves. Government agencies, however, cannot speak for their successors, or even predict their views, with respect to important questions of their public duty. Even this very order has not been set aside by the Commission.

The government's admission on brief of the invalidity of the order leaves it standing. And despite the government's confession in its brief of the invalidity of F.S.O. 19059, the railroads have not made any such acknowledgment.

In any future damage action by appellants against the railroads the government would, of course, not be a party. Unless F.S.O. 19059 is now voided, the position of the railroads makes it clear that in a damage action against them they will defend the order vigorously, and that their defenses will include both the doctrine of collateral attack as set forth on page 24 of appellants' opening brief, and the validity of F.S.O. 19059 itself. As was stated in the *Southern Pacific Terminal* case, it is not necessary to define the extent to which the Commission's

order may be the basis for further proceedings.[8] The fact that it may be is sufficient reason for the Court to retain jurisdiction.[9]

No attempt has been made in either brief to show why Section 10(b) of the Administrative Procedure Act does not provide for declaratory relief in this case. Both the government and the railroads apparently contend only that if injunctive relief is *not available*, neither is declaratory relief. As a corollary, if injunctive relief is available, then declaratory relief is also available to supplement injunctive relief wherever it is inadequate. As shown on pages 25-27 of appellants' opening brief this case does present an occasion to use declaratory relief as that useful supplement to the statutory review which is contemplated by Section 10(b) of the Administrative Procedure Act.

II. APPELLANTS HAVE EXHAUSTED THEIR ADMINISTRATIVE REMEDIES.

On pages 11-13 of their brief the railroads seek to change the character of appellants' complaint from one assailing the validity of F.S.O. 19059 to one protesting the Commission's failure to suspend the rates violating Section 4. The railroads insist that it was the Commission's failure to suspend the departure rates rather than its entry of the fourth section authorization which damaged appellants. The fact is, however, that the fourth section authorization causes the damage. Without it the railroads cannot lawfully effectuate the departure rates. Without the authorization they must either withdraw

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[8] 219 U.S. at 515.

[9] The government also suggests in its brief (p. 29) that hitherto damages have not been sought by one carrier against another. (Cf. Section 8 of the Interstate Commerce Act.) That does not mean that they will not be.

their departure rates or else be subject to penalties and *damages* for violation of the law.

Section 4 was in substantial part designed specifically for the protection of water carriers. *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557, 567-568 (1919). The Commission for many years recognized that the intention to divert water traffic to railroads by use of rates violating Section 4 gave affected water carriers an interest in applications for fourth section authorization. It accordingly considered the effect of the requested authorization upon competing water carriers as one of the principal determinants whether the requested relief should be granted in whole or in part. *Transcontinental Cases*, 74 I.C.C. 48, 71 (1922); *Citrus Fruit from Florida to North Atlantic Ports*, 266 I.C.C. 627, 636-638 (1946); *Pacific Coast Fourth Section Applications*, 264 I.C.C. 36, 39 (1945). The requirement in the National Transportation Policy[10] that *all* sections of the Interstate Commerce Act "shall" be construed to give effect to that policy surely has reiterated, in mandatory terms, the necessity for recognizing the interest of competing water carriers, including their interest in the procedures the Commission in authorizing the notoriously destructive form of rail competition to which Section 4 is addressed.

The railroads proceed from their fallacious premise to a fallacious conclusion that appellants' proper remedy is a complaint to the Commission under Sections 13 or 15 of the Act. But meantime the Commission has entered a binding order, not susceptible of collateral attack, authorizing the rates. The complaint before the Commission, they say, should allege the departure rates to be unreasonable or discriminatory as to the appellants. For this proposition they cite one sentence in *United States*

[10] 54 Stat. 899, 49 U.S.C. Note preceding Section 1.

v. *Merchants & Manufacturers Traffic Association of Sacramento*, 242 U.S. 178 (1916).[11] The fact is that in the proceeding now before this Court, appellants are complaining about the unlawful manner in which the Commission entered F.S.O. 19059. Section 4 of the statute has already passed upon the character of the rates, making them unlawful in the absence of Commission authorization. No further proceeding before the Commission, or anywhere else except this Court, now is available to appellants to review the Commission's method of entering F.S.O. 19059. Any proceeding for such purpose except this one, whether before the Commission or any other tribunal, would be dismissed as a collateral attack or as an attempt twice to litigate the same matter.

In *Skinner & Eddy Corp.* v. *United States, supra*, Justice Brandeis, who also wrote the opinion in the *Sacramento Case*, pointed out this fundamental distinction between review of Fourth Section orders and complaints under Sections 13 and 15 about the unreasonableness and discrimination of particular rates as applied to the complainants:

> "The defendants contend that the District Court did not have jurisdiction of the subject matter of this suit; because orders entered in a fourth section proceeding cannot be assailed in the courts; at least, not until after a remedy has been sought under §§13 and 15 of the Act to Regulate Commerce. This contention proceeds apparently upon a misapprehension of plaintiff's position. If plaintiff had sought relief against a rate or practice alleged to be unjust because unreasonably high or discriminatory, the remedy must have been sought primarily by proceeding before the Commission [citing cases]; and the finding thereon would have been conclusive, unless there was

[11] This case is also known as **The Sacramento Case.** See **Skinner & Eddy Corp. v. United States, 249 U.S. 557, 559 (1919).**

> lack of substantial evidence, some irregularity in the proceedings, or some error in the application of rules of law [citing cases]. But plaintiff does not contend that 75 cents is an unreasonably high rate or that there was mere error in the action of the Commission. The contention is that the Commission has exceeded its statutory powers; and that, hence, the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the Commission. [citing cases] *The Sacramento Case, supra,* was a case of this character."

In *The Sacramento Case* (or *United States* v. *Merchants & Manufacturers Traffic Ass'n*) this Court did review the validity of the Fourth Section order involved, even though it refused to pass upon the reasonableness of the rates as applied to that particular association. If the association had presented the question of the reasonableness of the rates to the Commission during the Commission's hearings on the Fourth Section application, even this question might have been open on the judicial review of the order. The association had, however, not participated in the hearing, intervening before the Commission for the first time to present a petition for reconsideration of the Commission orders.

III. F.S.O. 19059 IS VOID FOR LACK OF FINDINGS.

It does not appear necessary to labor this point. The government concedes that the lack of findings in the order renders it invalid (Br. pp. 32-33). The railroads halfheartedly say (Br. p. 20) that findings are not required in Fourth Section orders by Section 8(b) of the Administrative Procedure Act. Clearly in investigations by the Commission findings are required (*Alabama Great Southern Ry.* v. *United States,* 340 U.S. 216, 228 (1950)

and to meet the constitutional requirement that the Commission show it has exercised its delegated powers within its statutory authority (*Panama Refining Company* v. *Ryan*, 293 U.S. 388, 433 (1935)).

It is necessary that this Court confirm the government's concession. Affirmance of the order of the court below would in all likelihood be construed as negating the necessity for such a concession since it was not made before that court.

IV. APPELLANTS WERE ENTITLED TO A HEARING BEFORE THEY WERE INJURED BY GRANT OF ANY FOURTH SECTION AUTHORIZATION TO THE RAILROADS.

Both the government and the railroads have stated the problem presented here as though it involved *all* kinds of Fourth Section orders entered by the Commission (Gov't Br., p. 2 Second Question Presented; Rr. Br., p. 2, Third Question Presented). The issue is narrower than they say. The complaint prays for relief only with respect to the kind of case presented here, *viz.*, an application avowedly designed to divert traffic from competing regulated water carriers who have duly and timely protested the application, requested a hearing, and presented issues which the Commission obviously found merited hearing since it ordered a hearing to be held in the Fourth Section proceeding as well as ordering an investigation into other matters affecting the rates.

By thus expanding the scope of the complaint the railroads, and to a lesser extent the government, rest their defense on the use of the word "investigation" in Section 4 and "hearing" in certain other sections of the Act. From this they deduce that "investigation" and "hearing" have mutually exclusive meanings, and that Congress, there-

fore, could not have intended hearings to be required prior to the entry of any Fourth Section orders whatever. The government cites an extensive legislative history that indicates that Congress has not in recent years intended to require hearings before entry of all Fourth Section orders.

These arguments change the issue and miss the point. Appellants do not contend that the investigation required in Section 4 must include a hearing in all cases, but that investigation does not exclude a hearing in all cases and that this and similar cases involve circumstances requiring a hearing, both by statutory intent and the Constitutional standard of due process. In this case we are dealing only with a particular kind of Fourth Section proceeding, and here the congressional history indicates that the intention was to require a hearing.

Both the government and the railroads rely heavily on the failure of Congress to enact the Gooding Bill[12] in 1924 after the Commission had reported to congress that it had entered temporary authority orders (Gov't. Br. pp. 36-38, Rr. Br. p. 17). The fact is, however, that nowhere in the Commission's Report[13] nor in the testimony of Commissioners Hall and Campbell before the Senate Committee did the Commission report that temporary, or any other, authority was being granted *over protest* without a hearing.

Indeed, precisely the opposite impression was created. In Chairman Hall's letter[14] to the Committee stating the

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[12] S. 2327, 68th Cong., 1st Sess.

[13] Administration of Section 4 of the Interstate Commerce Act, 87 I.C.C. 564 (1924).

[14] Hearing on S. 2327 Before the Senate Committee on Interstate Commerce, 68th Cong., 1st Sess., 875 et seq., and particularly pp. 876-877; 65 Cong. Rec. 8880-8885, and particularly 8880-8881.

Commission's views on the bill, he pointed out that the Commission received many different kinds of Fourth Section applications, and that there was little interest by anyone other than the applicants in the vast majority of the applications. At hearings held on 209 original applications in 1923, outside interests filed only 31 appearances, and shippers' witnesses testified at only eight, only 2 of whom opposed the applications. Thus the uniform requirement of a hearing in so many cases in which there was no outside interest would require time and expense better devoted to other matters. Temporary authorities had been restricted to minor variations in tariffs filed prior to February 17, 1911 and protected by the grandfater proviso in Section 4, as it had been amended in 1910.[14a] Moreover, he assured the Committee:

> "The Commission has never denied a hearing on a fourth section application when hearing was sought by any party interested."[15]
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> "It may be added that no fourth-section relief has ever been granted in respect to transcontinental rates, and the rate relation of intermountain points to Pacific coast terminals, except upon hearing."[16]

[14a] The Mann-Elkins inserted this proviso into Section 4:

"Provided further, That no rates or charges lawfully existing at the time of the passage of this amendatory Act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this Act, nor in any case where application shall have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission." 36 Stat. 548.

[15] 65 Cong. Rec. 8880.

[16] Id. at 8881.

These same assurances were substantially repeated in his direct testimony to the Committee.[17]

Thus with respect to the important questions of that time involving Fourth Section rates, the Commission assured the Committee that no relief was ever granted without a hearing and that hearings were always held whenever requested.

The Senate Committee's Report on the Gooding Bill stated:[18]

> "the commission was authorized to grant relief in special cases after investigation (meaning, of course, a public hearing)."

The failure to enact the Gooding Bill is attributable in large measure to the assurances by the Commission that it would hold hearings in the circumstances it described. If there was legislative approval of Commission practice, it was of this practice of granting hearings in such cases even though it did not always do so on unprotested applications.

The Monograph on the Interstate Commerce Committee by the Attorney General's Committee on Administrative Procedure[19] refers at page 47 to the practice of entering temporary Fourth Section orders and states that hearings usually are not held, although in some instances hearings may be held on the question whether or not temporary relief should be granted for a specified period. It acknowledges the filing of protests in some cases, but does not state whether or not temporary relief is granted without hearing after filing of a protest. Hearings frequently were

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[17] Hearing on S. 2327 Before the Senate Committee on Interstate Commerce, 68th Cong., 1st Sess., pp. 462-467, 487.

[18] S. Rep. No. 302, 68th Cong., 1st Sess., p. 5.

[19] S. Doc. No. 10, Part 11, 77th Cong., 1st Sess.

held on applications for continuing relief even though no hearings was requested, and hearings always were held when requested. Six kinds of cases in which the Commission's Fourth Section Board was authorized to grant temporary relief in the name of Division 2 were enumerated in a Note on that same page. None even remotely resembles the situation presented by appellants' complaint. A similar report was made in 1944, and was no more explicit.[20] Indeed, from the fact that, in the 18 cases in which temporary relief was granted and "final" order entered after hearing, argument was held in only one case (obviously not a protested one, but one in which the Commission itself had required additional information), the obvious inference being that no protestants participated in any of these 18 proceedings. From the lack of any case law on this question until *Dixie Carriers* v. *United States,* 143 F. Supp. 844 (S.D. Tex., 1956) it may fairly be deduced that the Commission did not, over the protests of competing regulated water carriers, grant "temporary" relief without hearing and without completing the investigation it found necessary, much before 1954.

Even in 1960 Commissioner Winchell's testimony on S. 1881 referred only to the necessity to protect existing railroad traffic against diversion to other modes of transportation, stressing the competition of private and unregulated carriers.[21] This testimony has no relevance to

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[20] H. Doc. No. 678, 78th Cong., 2nd Sess., pp. 186-189.

[21] Hearings on The Decline In The Position of the Coastwise and Intercoastal Shipping Industry of the United States Before the Merchant Marine and Fisheries Subcommittee, Senate Committee on Interstate and Foreign Commerce, 86th Cong., 2nd Sess., p. 568.

the situation presented in this case, for here the traffic sought in the railroads' Fourth Section application was traffic which regulated water carriers had serviced for some years.

Meanwhile it had become clear that the railroads were using rates violating Section 4 largely as a competitive weapon against water transportation. In 1938 Commissioner Eastman pointed out in his testimony that the railroads could effectively use such rates only to compete with water carriers and to a very limited extent with truckers.[22] With the enactment of the Transportation Act of 1940[23] subjecting inland waterways carriers to regulation by the Commission, and at the same time subjecting the Commission to the congressional mandate in the National Transportation Policy that all sections of the Interstate Commerce Act must be construed in accordance with it, the original predominant purpose of Section 4 to protect water carriers from destructive competition of the railroads was heavily emphasized. A main concern of Congress in enacting the 1940 legislation, subjecting the inland waterway carriers to Commission regulation, was that sufficient safeguards be provided for the water carriers against railroad competition, so that they might not be invidiously treated by the Commission. See *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, 574-576 (1947).

The competition of the railroads with water carriers by means of rates that are unlawful without the commission's Fourth Section authorization has intensified since that time. The struggle of the water carriers to survive

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[22] Hearings on S. 1356 and H.R. 1668 Before the Senate Interstate Commerce Committee, 75th Cong., 3rd Sess., 781-782.

[23] 54 Stat. 898.

against this form of competition has become the most important aspect of the administration of Section 4. (Cf. R. 59; and Appellant's Brief, 33-35) Thus in recent years the reported appeals from the commission's Fourth Section orders have been taken by water carriers, as may be seen from citations in the various briefs filed in this proceeding. A Senate Subcommittee has found it necessary to hold hearings on the decline of the coastwise and intercoastal shipping industry. The Commission itself recognizes the decline in this and other segments of the water-carrier industry. 74th Ann. Rep., I.C.C., 1960, p. 180. Thus this case involves the most important problems of the day in the administration of Section 4, the type of problem as to which the Commission in 1924 assured Congress would invariably be made the subject of hearing prior to grant of any relief.

The government cites (Br. pp. 38-41) the legislation since 1938 permitting Fourth Section relief specifically authorized by the Commission to become effective without requiring the usual thirty days' notice specified in Section 6[24] and exempting Fourth Section departures based on circuity from the necessity of prior Commission authorization.[25] These particular changes are not relevant to the question whether the Commission should hold hearings and complete the investigation it finds necessary to its complete information before authorizing Fourth Section relief that is protested by regulated water carriers, whose traffic is to be the prey of the authority granted.

Nothing in the congressional history appears to diminish the reliance which Congress placed in 1924 on the Commission's assurance that hearings were held whenever

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[24] 54 Stat. 904.

[25] 71 Stat. 292.

requested by proper parties and that in the important cases of the day hearings would always be held, whether requested or not, before any relief was granted. In view of this, there can be but little doubt that it has been the congressional intent since 1910 that at least in such cases as this the Commission shall include a hearing in its investigation and do so before it disturbs the status quo.

A further reason for rejecting the Commission's construction of Section 4 is the substantial question of constitutionality raised by its construction, disclosed by the lack of fair play in its procedure, which it says Congress intended) in entering these so called temporary orders. The failure of this procedure to satisfy constitutionality requirements of due process is discussed below. For now it is sufficient to note the well-settled doctrine that when two constructions of a statute are possible, one of which raises grave constitutional questions, the construction avoiding such questions will be preferred. *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U.S. 1, 30 (1937).

The government (Br. 43-46) and the railroads (Br. 18-20) both contend that the Commission may enter an order called "temporary" (which stands for years) in circumstances such as this case presents, on the basis of only such investigation as it sees fit to give, without completing the investigation it finds to be necessary and which Section 4 requires.

The railroads rely on Section 4's grant of authority to the Commission to enter such orders "from time to time," citing *Skinner & Eddy Corp.* v. *United States*, *supra*. In that case, however, the court was discussing the modifications that might be required by changed conditions such as slides into the Panama Canal and the outbreak of a

World War. The court was not upholding a grant of authority entered before the investigation required by the statute was completed.

The government relies on *Community Broadcasting Co.* v. *Federal Communications Commission,* 274 F.2d 753 (D.C. Cir., 1960) and *The New England Divisions* Case, 261 U.S. 184 (1923). In the first a grant without hearing of a conditional license to operate a television station pending holding of a comparative hearing was set aside because a good-faith protest against the grant had been filed by another applicant also capable of operating such a station. The court strongly recommended to the Commission that it adhere to its own rules limiting grant of conditional licenses. These rules did not permit such a grant when more than one bona fide and valid application had been filed in the absence of necessity in the public interest for prompt establishment of service in a particular community, or of jeopardy arising from non-user, to the right of the United States under international agreements to retain the frequency under consideration. Thus this case appears to support appellants' contention that when they are rendering the required service and protest the railroads' attempt to divert their traffic, requesting a hearing, the Commission must complete its investigation before it can disturb the status quo by entering an order granting Fourth Section relief.

In *The New England Divisions* Case, the Commission's order under review was entered only after extensive hearings and laid down only a general guide on divisions. It had no immediate effect upon anyone who asked for further hearing. The application of that guide to particular rates and railroads was left to be worked out by the railroads and submitted to the Commission for approval, at

which time the parties were also to be permitted to show, if they chose, why the general guide should be modified as applied to them. *New England Divisions*, 66 I.C.C. 196, 206-207 (1922) In his concurring opinion Commissioner Potter specifically pointed out: "We can protect any particular carrier who brings to our attention a situation where the application of this method works hardship." 66 I.C.C. 196, 208 (1922). Justice Brandeis also pointed out that "serious injustice to any carrier could be avoided, by availing of the saving clause which allows anyone to except itself from the order, in whole or in part, on proper showing" 261 U.S. at 199. There was, of course, no saving clause in F.S.O. 19059 or in like "temporary" orders. If these orders are allowed to stand, they work *irremediable* injury upon appellants during the two-to-three year period required for the Commission to complete the investigation and enter a further order. Such a procedure clearly does not contain the safeguards which Justice Brandeis sought and found in *The New England Divisions* Case.

Finally the railroads challenge the constitutional necessity for a hearing in these circumstances, citing *Ewing* v. *Mytinger & Casselberry*, 339 U.S. 599 (1950); *Stoehr* v. *Wallace*, 255 U.S. 239 (1921) and *North American Cold Storage Company* v. *City of Chicago*, 211 U.S. 306 (1908). These cases are unanimous in holding that a hearing must be available in some proceeding which will give adequate remedy to the person injured by government action. Thus in the *Ewing* case the Food & Drug Administrator could determine without hearing only whether probable cause for instituting suit against the defendants existed, and defendants were entitled to a hearing before final determination would be made as to whether labeling of their product

violated the Act. In the *Stoehr* case if any person not an enemy instituted suit to show that the property in fact belonged to him, the Alien Property Custodian was required to retain the property seized pending disposition of the suit. Thus, in a war emergency measure such as the Trading With the Enemy Act, care was exercised to see that no final disposition of seized property was made until after non-enemies had had full opportunity for hearing. Similarly in the *North American Cold Storage Company* case the court held that the storage company could sue for damages and get a hearing on whether the food seized was unwholesome or not.

Appellants have no such opportunities for hearing and remedy open to them. When the "temporary" authority of the Commission is entered, the railroads for a period of years are enable to divert appellants' traffic and appellants can bring no action for damages suffered while the order is in effect. Direct appeal is not a satisfactory source of hearing since this would substitute the court for the Commission, contravening the doctrine of primary jurisdiction fostered by the Commission since *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Company*, 204 U.S. 426 (1906).

The government and the railroads assume that because the order is called "temporary" it cannot have any permanently injurious effect on appellant. The fact is, that the order is final for the period during which it is in effect. There is never any further determination by the Commission of the parties' rights for the period during which the order was in effect. No consideration of war, or protection of the public against deleterious foods, or frauds, is present to justify such a summary invasion of appellants' rights to their irreversible injury.

The extent to which the Fifth Amendment requires a hearing to be granted depends upon the specific factual context. This Court recently enunciated some of the pertinent considerations in *Hannah* v. *Larche,* 363 U.S. 420 (1960) at p. 442:

> "• • • Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used. Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing type of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account. An analysis of these factors demonstrates why it is that the particular rights claimed by the respondents need not be conferred upon those appearing before purely investigative agencies, of which the Commission on Civil Rights is one."

In the instant case the Commission by its Fourth Section orders which it calls "temporary" makes "binding determinations which directly affect the legal rights of individuals" during the period the orders continue in effect. The affected rights of these appellants are their rights to protection granted in the National Transportation Policy against destructive competition which diverts

the traffic which has been their life's blood. This Court says that "it is imperative" that in such actions agencies use "procedures which have traditionally been associated with the judicial process." How far short of this mark the Commission has fallen in entering its order under the circumstances described in the complaint may be seen from the following pertinent facts.

The traffic which the railroads' Fourth Section application here involved was avowedly designed to capture traffic which for years these water carriers had moved by barge to Chicago. The railroads were free to take unlimited time to gather information and prepare their application, and in fact did require a substantial period of time. The water carriers were then allowed only fifteen days in which to get their protests on file in Washington. In their protests, the protestants raised issues of fact and indicated that with additional time supporting evidence could be produced showing that the rates did not comply with the statutory standards. They requested a hearing and they asked that no "temporary" authority be granted pending the hearing. The railroads were allowed yet another ten days to file replies, to which, under the Commissioner's rules, the protestants were not allowed to respond. Despite this vast disparity in the opportunity to present their showing to the Commission and the denial of any opportunity whatsoever to appellants to cross-examine and test the railroads' interested showing, the Commission forthwith entered an order, violently and immediately changing the status quo, and causing a sharp and irremediable loss of traffic to appellants for a substantial period of time. Finally the Commission's dilatory action in the subsequent proceedings during which time the injury continued, made it imperative that the appellants institute this suit. Fair play requires more in

any proceeding which so severely affects interested parties who are seeking to protect their rights.

Mistaken assumptions appear to be responsible for the Commission's suggestion that it is enough if only it should "make findings, showing that, to the degree necessary to justify temporary (*Sic.*) relief, the statutory criteria have been satisfied." (Br. 33) It is a mistake to assume that injury repeatedly inflicted upon these appellants and lasting for months and years is unimportant because it is always called "temporary". That assumption is contrary to the facts of life and it is contrary to the record (R. 59, 60; 54).

An administrative authority that has only one-sided advice on contested issues of fact upon whose outcome it is required by law to guide its action, has not made either the investigation intended by Congress, or required by the constitution, when it takes irreversibly injurious actions immediately affecting the rights of the contending parties, and changing the status quo, while it still—admittedly—needs a hearing to be fully informed upon the decisive facts that should have controlled its action.

CONCLUSION.

For the reasons stated herein, appellants respectfully request this Court to find it has jurisdiction over this appeal, reverse and vacate the order of three-judge District Court, enjoin, and declare the nullity of, the order and supplemental orders of the Interstate Commerce Commission entered under its Fourth Section Order Number 19059, and hold that on similar Fourth Section applications to

the Commission, the Commission cannot grant any Fourth Section relief without findings of fact sufficient to show compliance with the statutory prerequisites to grant of such relief or prior to holding a hearing when duly so requested by those competing regulated carriers using water transportation whose traffic the applications are designed to divert.

Respectfully submitted,

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